REASONS FOR DENYING THE PETITION

Summary of Argument

The petition should be denied because the question presented by petitioner is not truly presented by this case. The lynchpin of petitioner's argument is that Puerto Rico has a substantive standard that is stricter than the federal "grossly excessive" standard, and if applied by the First Circuit, would have resulted in the reduction of the jury award by exactly one-half (such that HIMA would only be responsible for $1,292,500). Petitioner's argument hinges on the three carefully selected Puerto Rico cases where coincidentally the trial judge's award was reduced by about half, but omits those cases where no such remittitur occurred. On the basis of this alleged Puerto Rico standard, petitioner contends that the First Circuit's decision conflicts with *Erie* and *Gasperini* because it supposedly upholds a larger damage award than would have been permitted in a Puerto Rico court.

There is no conflict between the First Circuit's decision and the decisions of this Court because the First Circuit correctly applied *Erie* and *Gasperini*, and, moreover, then made clear that the damages award comported with the law of Puerto Rico. Looking beyond the three Puerto Rico cases cited by petitioner, which are factually very different from Baby Fabiola's case, Puerto Rico's case law does not establish any mandatory precedent for reducing medical malpractice jury awards by one-half, but rather sets forth a case-by-case determination based on the evidence of each fact specific case. In any event, that issue — whether the award here was, as the Puerto Rico Supreme Court puts it, "exaggeratedly high" — is one of *Puerto Rico* law, which petitioner, try as it might, cannot be allowed to transform into a question of

federal constitutional law. Petitioner has weaved an illusory web of conflict among the circuits, but looking at other case law not cited by petitioner easily untangles the web. In reviewing the Puerto Rico District Court's denial of remittitur, the First Circuit properly applied an abuse of discretion standard. Under that standard, and considering the ample uncontroverted evidence in this case, whether Puerto Rico's "exaggeratedly high" or the federal "grossly excessive" language was applied, the result would have been the same. Any alleged error is harmless. Finally, petitioner's failure to object to jury instructions regarding the numbers in the Life Care Plan, and explicit admissions as to the amount of monetary damages claimed in the Plan and for loss of potential income, has created a waiver of its request for remittitur regarding the award to Fabiola for future care and for loss of income.

I. The Alleged Conflict With Erie Rests on Petitioner's Misinterpretation of Puerto Rico Case Law

Petitioner glibly contends that there is a conflict with *Erie* because if the Puerto Rico Supreme Court had reviewed this jury award it would have reduced it by half based on the decision of *Riley v. Rodriguez de Pacheco*, 119 P.R. Dec. 762 (1987). This contention is without basis in law or fact. First, petitioner's three handpicked Puerto Rico cases are either outdated or distinguishable on the facts. Second, and most critically, there are other cases conveniently omitted by petitioner, which clearly provide that since no two cases are exactly alike, no single case, including *Riley*, can be considered binding precedent on another. Third, Puerto Rico's "exaggeratedly high" standard is, as found by the First Circuit, so similar to the federal "grossly excessive" standard that there is no departure, thus no substantive state standard, and thus no possible conflict with *Erie*.

Riley, Nieves and Blas-Toledo Are Readily Distinguished

No matter how it be camouflaged, the petition seeks a result based on interpreting the *Riley* decision to be a substantive standard mandating a *per se* reduction of every award. Petitioner holds up *Riley* as the monetary "benchmark" for all subsequent medical malpractice awards, even if decided almost 20 years later. Pet.'s brief at 13-15. Such is not the case. Even looking only at the three carefully selected cases proffered by petitioner, the First Circuit correctly refused such an interpretation. In short, applying a "ridiculously low or exaggeratedly high" standard to evaluate an award on a case by case basis, based on the evidence and facts of that particular case, is the only policy that can be gleaned from the Puerto Rico Supreme Court cases.

Based on the evidence of damages in *Riley*, the Puerto Rico Supreme Court determined that the trial judge's award for lost income and mental anguish to the plaintiff mother was reasonably supported. Pet. App. 211a. However, it determined that the award to the plaintiff child was "exaggerated" and reduced the award by approximately one-half. Pet. App. 211a. The facts and evidence in *Riley* are completely distinguishable from the case at bar. The *Riley* plaintiff suffered from "difficulty walking and diminished intellectual capacity." Pet. brief at 13. The diminished intellectual capacity is slightly below normal. Pet. App. 206a. There was no evidence of a life care plan, or any need for a caregiver, or any expert testimony as to damages. This is not even comparable to the instant case where it is uncontroverted that Baby Fabiola will never see, speak, or walk at all, with absolutely no chance for normal development, and will require a caregiver for the rest of her life. See Stipulated Facts, no. 15, App., *infra*, at 3a. Moreover, as discussed *ante*,

respondents submitted ample evidence of damages, none of which was refuted by petitioner, including the life care plan which was submitted as a joint exhibit, and expert testimony as to loss of income, and mental pain and suffering.

In reaching its decision, the *Riley* Court held, "We try to reach a reasonably balanced award, that is, not extremely low nor disproportionately high." Pet. App. 213a. Applying this standard to the evidence of damages before it, the *Riley* Court determined to only reduce the award to the child, not to the mother. Because two subsequent cases relied on *Riley* to also reduce a medical malpractice award, petitioner urges this Court to conclude that the *Riley* result, *i.e.* the reduction by one-half, is a mandatory precedent which constitutes a substantive standard. Critically absent from petitioner's analysis is any mention of the *Riley* standard, the "extremely low or exaggeratedly high." Instead, petitioner focuses only on the result, and on an alleged "substantive policy of ensuring consistency among medical malpractice awards." Petitioner's brief at 15. Yet nowhere in *Riley* or the other two Puerto Rico cases is any mention made of such policy. Indeed, the word "consistency" is not even mentioned. The petitioner's quest for a uniform rule of reduction demonstrates its misunderstanding of the nature of a court's fact-specific review of a jury award.

Petitioner builds its straw man on three cases of the Puerto Rico Supreme Court, including *Riley*. *See Blas-Toledo v. Hosp. Nuestra Senora de la Guadelupe*, 146 P.R. Dec. 267 (1998); *Nieves-Cruz v. U.P.R.*, 151 P.R. Dec. 150 (2000). We briefly distinguish these two cases before addressing other Puerto Rico cases that refute the alleged standard proposed by petitioner. First, in *Blas Toledo*, the plaintiff child died shortly after the trial, and before the appeal was decided by

the Puerto Rico Supreme Court. The Court actually held that the amount awarded by the trial court to the child for future care was "originally correct," based on the estimated 25 year life span, but solely because of the child's early death, the amount was to be modified accordingly. Petitioner's App. at 118a-120a. The award of special damages to the mother was also upheld, but modified due to the child's early death. *Nieves-Cruz* is easily distinguishable for two reasons: 1) the only plaintiff was the minor child, so the entire $4 million award was allocated to the child, as opposed to here where the entire $2.525 million award was divided among three plaintiffs; 2) the $3.225 million awarded for future care and loss of income was based on an estimated life span of 70 years, which the Court found to be "highly speculative," and thus reduced it accordingly. *Id.* at 53a. In contrast, in the instant action the estimated life span of 35-45 years was not speculative, but rather, was based on an expert neurologist's report, and stipulated to by petitioner HIMA. App. at 4a-5a.

Other Puerto Rico Cases Make it Clear that Riley is No Benchmark

A mere cursory glance at other Puerto Rico cases further reveals the vulnerability of petitioner's straw man. In 1997, ten years after *Riley*, the Puerto Rico Supreme Court decided *Toro Aponte v. E.L.A.*, 142 P.R. Dec. 464 (1997), a medical malpractice case in which the Court refused to reduce the trial judge's award. App., *infra*, at 11a-45a. At the outset the *Toro Aponte* court, citing *Riley*, sets forth the applicable standard of review: "we will only intervene in the amount awarded, if it is exaggeratedly high or ridiculously low." App. at 27a. And then, in language that directly undermines petitioner's Don Quijote-like quest for a uniform rule, the *Toro Aponte* Court stated:

> Recall that "*there are no two cases exactly the same*; each case can be distinguished by its own and varied circumstances. That is why that . . . the decision rendered in a specific case in relation to this subject, *cannot be considered a mandatory precedent for another case*".

Id. at 478 (emphasis supplied), quoting *Rodriguez Cancel v. A.E.E.*, 116 P.R. Dec. 443, 451 (1985). App. at 27a.

In *Toro Aponte*, evidence of the pain and suffering endured by the mother who underwent a cesarean section where the doctor negligently left a surgical tool inside, and the severe organ damage that resulted, as well as the spouse's emotional pain and suffering, convinced the Puerto Rico Supreme Court that a remittitur was not warranted. Significantly, the Court also noted that a comparative review of case law proffered by the defendant did not persuade it to modify the award. App. at 22a.

The *Toro Aponte* decision alone is sufficient to poke a hole in petitioner's three case strawman. But there is more. In *Elba A.B.M. v. U.P.R.*, 125 P.R. Dec. 294, 327 (1990), decided three years after the "*Riley* benchmark," the Puerto Rico Supreme Court denied a request for remittitur, applying the "exaggeratedly high" standard. The Court quoted the same language from *Toro Aponte*, and *Rodriguez Cancel*, *ante*, as to how no two cases are alike, and no one case can be considered mandatory precedent. *Id.* Four years after *Riley*, the Puerto Rico Supreme Court again addressed a request for remittitur in a medical malpractice case, and decided, based on the evidence, not only to deny remittitur, but to increase the award. *Velazquez Ortiz v. U.P.R.*, 128 P.R. Dec. 234, 236 (1991) (*per curiam*). In *Velazquez Ortiz*, the Court

used the exaggeratedly high standard, and also relied on the *Toro Apontel Rodriguez Cancel* language, *ante*.

In *Quiñones Lopez v. Manzano Pozas*, 141 P.R. Dec. 139, 179 (1996), decided nine years after the "*Riley* benchmark," the Supreme Court of Puerto Rico rejected a request for remittitur based on an analogous case. The Court relied on the *Toro Apontel Rodriguez Cancel* language, no two cases are exactly alike, and no case can be a mandatory precedent, in refusing to reduce the award based on a comparatively lower award in an analogous case. *Id.* And finally, in *Agosto Vazquez v. Woolworth & Co.*, 143 P.R. Dec. 76, 81 (1997) (*per curiam*), decided ten years after *Riley*, the Puerto Rico Supreme Court applied the exaggeratedly high standard in rejecting a request for remittitur. This decision also relies on the "no two cases are alike" language of *Toro Apontel Rodriguez Cancel*. *Id.*

Thus, petitioner's glib conclusion that there is a conflict with *Erie* because the Puerto Rico Supreme Court would have compared the instant $2.525 million verdict to the *Riley* "benchmark," and then reduced the verdict by half, is sheer speculation, not supported by Puerto Rico precedent. In light of the above case law, the isolated cases of *Blas Toledo* and *Nieves Cruz* do not support petitioner's argument that the monetary award in *Riley* is mandatory precedent. The Puerto Rico Supreme Court policy is merely that it should only intervene in a trial judge's award if it is "ridiculously low or exaggeratedly high," based on the facts and evidence of that particular case. *See, e.g., Toro Aponte*, 142 P.R. Dec. 464. By no stretch can this policy be interpreted as petitioner urges — that "the Puerto Rico Supreme Court has employed a comparative excessive damages standard that *requires* medical malpractice awards to conform to prior awards in Puerto Rico courts." Pet. Brief at 17 (emphasis supplied).

Petitioner's assertion that this petition presents a conflict with *Erie* is without merit. There is no conflict with *Erie*, there is only a conflict between petitioner's speculative and incorrect interpretation of Puerto Rico policy, and the policy as unambiguously stated by the Puerto Rico Supreme Court.

II. The First Circuit's Decision Does Not Conflict With *Erie* or *Gasperini*, Because the Federal and State Standards are the Same

As stated in the First Circuit decision below, under this Court's holding in *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 431 (1996), federal courts sitting in diversity must apply state substantive standards in reviewing jury awards. Pet. App. 15a. This Court's decision in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), controls whether the state standard is substantive or procedural. In *Gasperini*, a New York state statute codified a new "deviates materially" standard of review, replacing the former "shock the conscience" standard previously used in New York state courts. The First Circuit found notable *Gasperini's* emphasis that the "deviates materially" standard was more "rigorous" than its federal counterpart, the "shock the conscience" standard, and that it had a "manifestly substantive" objective. Pet. App. 17a, citing *Gasperini*, 518 U.S. at 429. Applying *Erie*, this Court determined that the New York statute was both substantive and procedural. *Id.* at 426. The Court noted that if the New York statute had merely placed a cap on damages it would readily have been considered a substantive standard. However, although the New York statute was "less readily classified, it was designed to provide an analogous control." *Id.* at 429. Accordingly, this Court concluded that the rigorous "deviates materially" language constituted a substantive standard, even though the assignation of decision-

making authority to the appellate courts to engage in comparative evaluations was procedural. *Id.*

The First Circuit properly engaged in the same *Gasperini/Erie* analysis in order to determine whether the Puerto Rico Supreme Court had "adopted a more rigorous standard of review for medical malpractice damages that is tantamount to a substantive rule of law that must be applied in diversity cases." Pet. App. 17a. Looking at the same three cases proffered by petitioner herein, the First Circuit considered the "ridiculously low or exaggeratedly high" language used by the Puerto Rico Supreme Court, and determined that it echoes the federal "grossly excessive" standard. *Id.* at 16a. Notably, although petitioner characterizes as "superficial" the First Circuit's determination that the Puerto Rico standard echoes the federal standard, petitioner fails to identify any difference between the two standards. Pet. Brief at 21. The First Circuit concluded that Puerto Rico case law does not suggest a departure from the federal standards for judging excessiveness, and thus does not provide a substantive rule of law that must be applied in diversity cases. *Id.* at 17a.

It is this conclusion with which petitioner finds fault, however this does not by any means, constitute a conflict with *Erie* or *Gasperini*. *Gasperini* did not hold that every state standard must be applied in diversity cases, but rather that only substantive state standards would be applicable. Otherwise, the principles espoused in *Erie* would be meaningless. Petitioner feebly attempts to cast this as a source of confusion, see petitioner's brief at 8, but nothing could be more straightforward. The First Circuit properly conducted an *Erie* analysis as per the mandates of *Gasperini* – it is the First Circuit's application of the law to the facts that is petitioner's real issue here, not the illusory conflict.

The bottom line is that petitioner has failed to demonstrate any rationale or basis for determining that Puerto Rico's "exaggeratedly high" standard is any stricter than the federal "grossly excessive" standard. Petitioner's attempt to characterize Puerto Rico policy as requiring strict conformity with prior awards has already been shown, *ante*, to be without merit. Petitioner relied on this characterization in order to create a similarity with the New York statute in *Gasperini*, but it is unavailing. Even if it were so, it is that comparative undertaking that was determined by this Court to be the procedural component, whereas the substantive component was the statute's stricter "deviates materially" standard. This stricter standard is simply not present in the Puerto Rico cases, and thus the First Circuit properly determined that there was no departure from the federal standard. Again, this does not present an issue of conflict, but rather a misinterpretation by petitioner of Puerto Rico authority.

III. Petitioner's Web of Conflict Among the Circuits is Illusory

Petitioner attempts to weave a web of conflict among the circuits as a last-ditch attempt to attract this Court's attention. On closer look, however, this web easily untangles. Again, petitioner has handpicked a few isolated cases to support its argument that there is a split in the circuits. Presumably the Sixth, Seventh and Ninth Circuits apply the federal excessiveness standard without engaging in any *Erie* analysis or even referencing *Gasperini*, whereas the Eighth and Tenth Circuits always apply the state standard, even if it is the same as the federal standard. Pet. brief at 17-23.

Defeating petitioner's premise regarding the first group, in 2002 the Seventh Circuit expressly held, in accordance

with *Gasperini*, that the substantive law of the state determines whether a damages award is adequately supported by the evidence. *Jabat, Inc. v. Smith*, 201 F.3d 852, 857 (7th Cir. 2002). *See also Houben v. Telular Corp.*, 309 F.3d 1028, 1034-36 (7th Cir. 2002) (fully discussing *Gasperini*); *Jutzi-Johnson v. United States*, 263 F.3d 753 (7th Cir. 2001) (discussing *Gasperini*). Moreover, the single Seventh Circuit case cited by petitioner applies the federal excessiveness standard, but it is interchangeable with the state "shocks the conscience" standard. *Kapelanski v. Johnson*, 390 F.3d 525 (7th Cir. 2004). In *Galam v. Carmel* (In re Larry's Apt., L.L.C.), 249 F.3d 832, 837 (9th Cir. 2001), the Ninth Circuit held that a federal court sitting in diversity applies state substantive law regarding attorney's fees. In *Freund v. Nycomed Amersham*, 347 F.3d 752, 761 (9th Cir. 2003), a diversity case, the Ninth Circuit cited *Gasperini* and applied substantive state law in reviewing the district court's award of damages. Similarly, the Sixth Circuit has repeatedly referenced *Gasperini* and held that in diversity cases substantive state law is applicable to determine whether an award of damages is excessive. *See, e.g., Lewis v. Quaker Chem. Corp.*, 2000 U.S. App. LEXIS 22321 (6th Cir. 2000); *David v. Ana TV Network, Inc.*, 2000 U.S. App. LEXIS 2477, *19 (6th Cir. 2000); *Tatum by Tatum v. Land*, 1997 U.S. App. LEXIS 3798 (6th Cir. 1997). Thus, looking beyond petitioner's handpicked cases demonstrates that the Sixth, Seventh and Ninth Circuits are correctly applying *Gasperini*.

Petitioner also attempts to colour the Eighth and Tenth Circuit's applicati on of *Gasperini* to create a conflict with the other Circuits. But even as set forth in petitioner's brief, these Circuits are correctly interpreting *Gasperini* to require the application of "state substantive law" in determining whether an award is excessive. Pet. brief at 19. Petitioner

makes much ado about the fact that the state standard is the same as the federal standard, and the Circuit Court nevertheless applied the state standard. This is a difference without a distinction, because the result would have been the same whether the Circuit Court applied the state or federal standard, and thus *Erie* is not even implicated. In sum, there is no conflict among the Circuit courts.

For the same reason, even if the District Court of Puerto Rico had erred by determining that the federal rather than the state standard should apply, any error is harmless. Considering the ample and uncontroverted evidence in this case, and the similarity between the "grossly excessive" and "exaggeratedly high" standards, applying either standard would have resulted in the same determination that the award was by no means excessive. This is particularly true considering that the First Circuit properly applied, as per *Gasperini*, an abuse of discretion standard to review the District Court of Puerto Rico's denial of remittitur. Pet. App. 17a. *See also*, *Gasperini*, 518 U.S. at 438-39.

IV. Petitioner Has Waived Its Right to Request Remittitur Regarding the Awards for Future Care and Loss of Potential Income

As fully set forth in respondent's Statement, ánte, petitioner has waived its right to request remittitur regarding the award to Baby Fabiola for future care and for loss of potential income, since at trial it stipulated to, expressly conceded, and/or failed to refute the precise monetary damages asserted. To briefly recap: 1) HIMA expressly stipulated to Baby Fabiola's prognosis and her 35-45 year life span; 2) the respondents' expert's Life Care Plan was submitted as a joint exhibit, and when the District Judge

instructed the jury to consider those numbers provided in the Plan in determining past and future expenses HIMA did not object; 3) not only did HIMA fail to object it stated for the record that it had no problem submitting the Plan to the jury because "those are the numbers" ($1.9 million); and 4) during closing arguments HIMA stated that it was "not questioning the loss of potential income, the $350,534.56."

It is axiomatic that a party's stipulations are binding on that party and may not be contradicted by him at trial or on appeal. *See, e.g., Feliciano v. Rullan*, 303 F.3d 1, 8 (1st Cir. 2002); *Keller v. United States*, 58 F.3d 1194, 1199 n.8 (7th Cir. 1995). A stipulation or "the withdrawal of an objection is tantamount to a waiver of an issue for appeal." *Yeti by Molly Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1108-09 (9th Cir. 2001). "When parties do not object to jury instructions, these instructions generally become the law of the case." *Geldermann, Inc. v. Financial Management Consultants, Inc.*, 27 F.3d 307, 312 (7th Cir. 1994). In light of petitioner's stipulations, direct concessions which amount to stipulations, and failure to object, its argument that the award to Fabiola for future care, or for loss of potential income, is excessive, is expressly waived, and should not be considered by this Court.

CONCLUSION

The writ of certiorari should not issue. There is no conflict between the decision below and this Court's decision in *Erie* or *Gasperini*. There is no conflict among the Circuit Courts since any one of them would have applied the same test and reached the same conclusion as the First Circuit did in this case.

Respectfully submitted,

CARLOS A. RUIZ
P.O. Box 12980
Caguas, P.R. 00726-01298
(787) 286-8775

JORGE M. SURO-BALLESTER
Counsel of Record
1225 Ponce de León Ave., PH-2
San Juan, P.R. 00907-3921
(787) 724-5522

Counsel for Respondents

January 3, 2006

APPENDIX

APPENDIX A — STIPULATED FACTS FILED IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO ON SEPTEMBER 9, 2003

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

CIVIL NO. 02-1068 (HL)

MARIA YOLANDA MARCANO RIVERA, et al.,

Plaintiffs,

v.

DR. PEDRO ROLDAN MILLAN, et al.,

Defendants

STIPULATED FACTS

TO THE HONORABLE HECTOR M. LAFFITTE
UNITED STATES DISTRICT COURT JUDGE:

COME NOW, the parties, through their respective legal counsel and, respectfully submit the following Stipulations of Facts:

1. Defendant Turabo Medical Center Partnership (TMCP) is a Delaware partnership having its principal place of business in Caguas, Puerto Rico. As September 14, 2000, TMCP was the owner and operator of the Hospital Interamericano de Medicina Avanzada in Caguas, Puerto

Appendix A

Rico, hereinafter, HIMA. TMCP ceased its existence on December 31, 2002 and Centro Medico Del Turabo, Inc. became the successor to TMCP, assuming all of its assets and liabilities.

2. As of September 14, 2000, Dr. Pedro Roldán Millan was an obstetrician gynecologist with 33 years of experience.

3. Dr. Roldan was not employed by HIMA. Dr. Roldan enjoyed privileges at HIMA from 1988-2001.

4. Upon Mrs. Marcano's admission to HIMA on September 14, 2000, HIMA obtained a consent from Mrs. Marcano authorizing the use of the procedures and medications that her lead physician Dr. Pedro Roldan deemed necessary, and a consent for surgery also authorizing the procedures (labor/cesarean procedure) that her lead physician deemed necessary.

5. Upon Mrs. Marcano's admission to the hospital on Dr. Roldan's orders, Mrs. Marcano was placed in Room 206, which is the room right across the nurses counter.

6. Mrs. Marcano was connected to an electronic fetal monitor on or about 10:00 a.m. upon her admission to HIMA.

7. The fetal monitor to which plaintiff Maria Yolanda Rivera Marcano was connected is a Corometrics Model 115.

8. The Corometrics 115 fetal monitor comes equipped with a strip-chart recorder that records and prints in paper the fetal heart rate and the uterine contractions. The document

where these are printed is known as a flow chart or tracing. The monitor also has a digital screen that displays the fetal heart rate as it is registered.

9. The flow chart or tracing of the fetal heart rate of Fabiola and of the uterine contractions of Maria Yolanda Marcano Rivera from 10:00 a.m. to 3:27 p.m. is missing.

10. Maria Yolanda Marcano Rivera was disconnected from the fetal monitor between 5:30 and 6:00 p.m. before transferring her to the delivery room. There is no tracing or flowchart after Maria Yolanda Marcano Rivera was disconnected from the fetal monitor.

11. Baby Fabiola Rodriguez Marcano was born on September 14, 2000, at 6:19 p.m., at HIMA.

12. Dr. Antonio R. González Santos is a pediatric neurologist who at the time of Fabiola's birth had privileges to practice at HIMA. On September 15, 2000, he answered a consultation from the HIMA's Neonatal Group concerning Fabiola's condition at birth. His diagnosis was "newborn asphyxia".

13. On September 24, 2000, Dr. Irma Morales, a pediatrician who had privileges at HIMA, answered a consultation from the Neonatal Group concerning Fabiola's condition at birth. Her diagnoses wee neonatal depression, neonatal asphyxia and seizures probably secondary to neonatal asphyxia.

Appendix A

14. On October 2, 2000, Dr. Edgardo Jimènez, from the Nēonatal Group, made the following diagnoses concerning Fabiola, neonatal depression, perinatal asphyxia, neonatal seizures, anoxic encephalopathy, mechanical ventilation.

15. Fabiola's prognosis is grim with absolutely no chance for normal development. She will never be ambulatory nor will she ever see or communicate, and will require a caregiver for the rest of her life.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, this 9th day of September 2003.

s/ Jorge Miguel Suro Ballester, Esq.
JORGE MIGUEL SURO BALLESTER, ESQ.

s/ Orlando H. Martinez Echeverria, Esq.
ORLANDO H. MARTINEZ ECHEVERRIA, ESQ.

s/ Fernando E. Agrait, Esq.
FERNANDO E. AGRAIT, ESQ.

APPENDIX B — EXCERPTS OF TRANSCRIPT OF PROCEEDINGS DATED OCTOBER 15, 2003

[commencing at page 227]

Afternoon Session

(In open court, jury not present:)

MR. SURO-BALLESTER: Your Honor, there are two housekeeping matters, one of them being, we came to a stipulation yesterday afternoon that it would not be necessary for the Plaintiffs to call Dr. Jose Carlo, a neurologist, to give his opinion as to the life expectancy of Fabiola. We have agreed that the life expectancy of Fabiola is as indicated in Dr. Carlo's report, from 35 to 45 years of age.

We somehow need to explain that to the jury that during my opening statement, the preliminary instructions, it was mentioned Dr. Carlo would be one of the witnesses involved in this case.

THE COURT: You mean your opening statement, because I didn't say that. You said preliminary instructions.

MR. SURO-BALLESTER: In the voir [228] dire, these are the witnesses.

THE COURT: Fine.

MR. SURO-BALLESTER: And the testimony of Dr. Carlos Rodriguez, the economist, our next witness, one of the bases for that testimony is precisely the life expectancy.

Appendix B

THE COURT: Fine. You say it has been stipulated that Baby Fabiola will have a life expectancy of so many years. That's it.

* * * *

APPENDIX C — EXCERPTS OF TRANSCRIPT OF PROCEEDINGS DATED OCTOBER 20, 2003

[commencing at page 584]

* * *

You should consider the following items for elements of damages to the extent you find them proved by a [585] preponderance of the evidence:

A, medical and hospital expenses, past and future, including the ones provided in Fabiola's life care plan.

B, Plaintiff Fabiola's physical pain and anguish.

C, Plaintiff Fabiola's potential loss of income.

D, Fabiola's parents' pain and suffering; Fabiola's parents' capacity to enjoy life.

* * * *

APPENDIX D — EXCERPTS OF TRANSCRIPT OF PROCEEDINGS DATED OCTOBER 20, 2003

[commencing at page 595]

* * *

(In open court, jury not present:)

THE COURT: I just received a message from the jury, and they have requested the Court the following: Please provide the following, one calculator, which I'm going to submit to them, a copy of Dr. Woodrich economic projections of life care plan, [596] loss of income, et cetera.

MR. SURO-BALLESTER: Dr. Woodrich's report, if I'm not mistaken, was not submitted into evidence. What was submitted into evidence, which are Exhibits 10 and 10-A, are the reports of Dr. Carlos Rodriguez.

THE COURT: They're not asking for that.

MR. AGRAIT-BETANCOURT: Your Honor, I understand that the only reason Dr. Woodrich's report was not submitted into evidence was because his testimony was the same as the report. In terms of the Defendant, we have no problem.

THE COURT: To submit the report.

MR. AGRAIT-BETANCOURT: Those are the numbers.

Appendix D

THE COURT: Let's have that marked as joint exhibit — where is it?

THE CLERK: It will be Joint Exhibit Number 7, Your Honor.

* * * *

APPENDIX E -- EXCERPTS OF TRANSCRIPT OF PROCEEDINGS DATED OCTOBER 20, 2003

[commencing at page 534]

* * *

We are not questioning the loss of potential income, the $350,534.56. We do not question the reality of serious personal damages. We are convinced by the same evidence that you heard and received that it was Dr. Roldan's responsibility.

* * * *

APPENDIX F — OPINION OF THE SUPREME COURT OF PUERTO RICO DECIDED JANUARY 31, 1997

IN THE SUPREME COURT OF PUERTO RICO

Number: RE-90-560

NANCY TORO APONTE / MANUEL ALVAREZ,

Plaintiffs-Appellees,

v.

COMMONWEALTH OF PUERTO RICO ET ALS ,

Defendants-Appellants.

Decided: January 31st, 1997

JUDGE PRESIDING MISTER ANDREU-GARCIA Issued the opinion of the Court.

The (medical) profession is one of those which most risks entails, both for he who exercises same, as well as he who receives same. This is basically due to the object itself of this very profession: human beings, which becomes subject to medical situations in several of the most important aspects of their personality, and health in particular. (Note omitted). J. Fernandez Costales, Hospital and Medical Civil Liability, Madrid, Edilex Editors, 1987, page 3.

Physicians Jorge Carlo Font and Jose Cruz Santiago, do not request that we revoke sentence by the extinct Superior

Appendix F

Court, Mayaguez Part (Hon. Angel M. Almodovar Correa, Judge), which ordered they disburse one hundred and twelve thousand five hundred dollars ($112,500.00) compensation for torts resulting from a surgical procedure to which plaintiff Nancy Toro Aponte was subjected to. Said amount is equivalent to seventy five percent (75%) of the total sum of one hundred and fifty thousand ($150,00.00) dollars, which the trial court granted to plaintiffs, for damages suffered as result of carelessness during surgery, which resulted in leaving behind a surgical gauze within the abdomen of Mrs. Toro Aponte. The remaining thirty seven thousand five hundred dollars ($37,500.00), equivalent to twenty five percent (25%) of liability befell upon the Commonwealth (henceforth E.L.A.), owner of the hospital where Plaintiff had her surgery, and employer of all other persons who participated in such surgery.

Through a writ of appeal before us, they have indicated commission of the following errors by the trial court: (1) that compensation granted was excessive; (2) that certain expressions were mistakenly interpreted as admission of liability, and (3) that E.L.A. should have been liable for the totality of damages, since it was the employer of the direct precipitator of such damages.

We issue this writ, upon request of plaintiffs. Confirmation is appropriate.

I

This anguishing drama began when youth Nancy Toro Aponte, in late 1987, became pregnant by Luis Manuel Alvarez Velez with whom she had lived as concubine. To deal with her pregnancy, Mrs. Toro-Aponte visited the joint offices of physicians Salvador Rovira Martino, Jorge Carlo Font and Jose D. Cruz Santiago, who attended her during her pregnancy period.

Appendix F

On June 29th of 1988, having thirty seven weeks elapsed, Dr. Cruz Santiago referred her over to the Mayaguez Medical Center. She was there admitted to the Gynecology and Obstetrics Department of the Hospital. Management and administration of said department had been subcontracted to the *Centro Ginecobstetrico* a civilian partnership composed of physicians Cruz-Santiago, Rovira-Martino and Carlo Font. Around midnight, Dr. Carlo Font, physician on duty in charge of the Delivery Room, informed Mrs. Toro Aponte that her delivery needed to be by cesarean[1] which he performed during early hours.

Under apparent recovery, Mrs. Toro Aponte was discharged from the Medical Center, two (2) days after

---

1. Cesarean is defined as "surgical procedure ext- -ting a fetus through the abdominal wall . . ." Teide Medical Dictionary, Barcelona, Ed. Teide, 1988, p. 103. Accompanying her at the surgery room were anesthesiologist Ernesto Santini, Dr. Laura Rios[2], rotating nurse Norma Arroyo and operating room Technician Jaime Ortiz.[3] Dr. Carlo Font successfully performed the delivery, a baby girl and, prior to closing the wound, requested counting of instruments and gauzes utilized. Nurse Arroyo assured that all surgical instruments were outside of the patient's body and she so acknowledged it through certification in the surgical record. Trusting said nurse's count, the physician then proceed to close the wound.

2. According to testimony from Dr. Jorge Carlo Font at hearing in full, During said surgery, Dr. Laura Rios suffered faint headedness, and had to Prematurely absent herself from the room. Narrative discourse of Oral Testimony. (henceforth ENP), page 14.

3. Duties of the room technician, also known as instrumentationist or scrub nurse, is to assist in counting surgical instruments, and to organize the materials tray. ENP, pages 13 and 15.

surgery, and returned home. After eight (8) days elapsed subsequent to delivery, Mrs. Aponte visited Dr. Cruz Santiago at his office, to have the surgical sutures removed. She then informed the physician that she had been feeling severe abdominal pains ever since her surgery. Doctor Cruz Santiago assumed that her discomfort was due to surgical trauma, and prescribed analgesics. After three (3) weeks, the medications had not evidenced any effect, the pain had become "unbearable", and begun to suffer from diarrhea, according to said aggrieved party's testimony. Narrative discourse of Oral Testimony (henceforth, ENP), page 3. Things being such, she again went over to her physicians offices. Dr. Cruz Santiago again proceeded to examine her through a vaginal examination, and noticed that the womb of Mrs. Toro Aponte was swollen. Even so, said physician did not consider it necessary to have x-rays or a sonogram done on her.

Dissatisfied, Mrs. Toro Aponte then decided to obtain a second opinion. She went over to the office of Dr. Elena Arroyo, a specialist in female diseases. Dr. Arroyo suspected that something was wrong, since pains relating to cesarean surgeries tend to disappear within less than two (2) weeks. Upon examining her, she felt a mass within her abdominal area, and instructed her to swiftly get a sonogram and consult her gynecologist or some other specialist, if she so preferred. Mrs. Toro Aponte had her sonogram done, as indicated, and once again returned to the offices of defendant physicians.

On this occasion she was seen by her surgeon, Doctor Carlo Font who, dissatisfied with the sonogram that Mrs. Toro had obtained, requested she take another one done. By this time she had lost all faith and trust in her physicians,

thus, instead of following the recommendations of Dr. Carlo Font, she chose to see another physician. Consequently, on August 26th she visited Dr. Hector Casanova. Although said physician prescribed intravenous antibiotics, her condition did not improve much during that weel- end. The following Monday, she woke up vomiting, with diarrhea and an unbearable pain. That very same day, Dr. Casanova ordered x-rays and a sonogram be urgently taken at the Perea Clinic in Mayaguez. The x-ray revealed the presence of a foreign body within the abdominal area, wherefore the physician immediately proceeded to have exploratory surgery performed on her.

Doctor Casanova and surgeon Pedro E. Perez Perez discovered, within the Abdominal cavity of Mrs. Toro Aponte, a surgical gauze which measured 43 cm. in length by 40 cm. in width, adhered to the lower portion of her small intestine (ileum), at the point in which same ends towards the colon.[4] The infection was of such a magnitude, that upon removing said gauze, the walls of the large intestine were perforated. Moreover, she had developed peritonitis and extensive swelling of the adjoining tissues. Doctor Perez had to perform a partial re-insertion of the intestine of about approximately five (5) to six (6) inches in length,[5] and reattach the small intestine to her colon, through a

4. The colon is defined as "the main portion of the large intestine . . . (which) does not have a digestive function, but absorbs huge quantities of water and electrolytes from non-digested foods arriving from the small intestine. Intense peristaltic movements which are produced at given intervals, move the dehydrated content (feces), toward the rectum". Teide Medical Dictionary, quoted text, page 127.

5. Resection is defined as "extraction of a portion or organ from bone extremities or (from) other tissues." Diccionario Terminológico

(Cont'd)

sutured attachment (anastomosis). A colostomy was performed, so that said anastomosis could properly scar,[6] inasmuch that she could defecate through an incision in her abdomen. Mrs. Toro Aponte had to defecate through a bag during ten (10) months and, subsequently, was subjected to another surgery, to close-up said colostomy.

As a result of such events, Mrs. Toro Aponte and her partner Luis Manuel Alvarez Velez sued the physician partners of Centro Ginecobstétrico, doctors Carlo Font, Cruz Santiago and Rovira Martino;[7], their respective community

(Cont'd)

de Ciencias Medicas, (Medical Sciences Terminological Dictionary), 1th Ed., Barcelona, Salvat Editores, 1984, page 240.

Dr. Pedro E. Perez-Perez stated at the hearing that re-sectioning of the small intestine measured close to ten (10) centimeters on each side, equivalent to barely less than eight (8) inches, ENP, page 10.

6. Colostomy is a "surgical procedure through which a portion of the colon is opened on to the abdominal wall, allowing for drainage or decompression of the intestine, through the artificial opening . . . Generally, a bag is attached to the opening for said colostomy . . . to pick-up the feces . . ." Teide Medical Dictionary, quoted text, page 129.

7. Doctors Cruz Santiago, Carlo Font and Rovira Martino filed a third Party complaint against the Commonwealth of Puerto Rico (henceforth, E.L.A.), alleging that if any negligent omission was committed, same had to be attributed to Medical Center employees, in which case the State would have become liable to plaintiffs. They requested that, if any joint liability with E.L.A. were imposed upon them, that the State be ordered to reimburse them for whatever they were to disburse.

(Cont'd)

properties; Dr. Laura Rios[8] and her community partnership; the Commonwealth of Puerto Rico[9], plus two (2) defendants of unknown identity, claiming damages for negligence. In their judicial claim Mrs. Toro Aponte and Mr. Alvarez Velez alleged that the carelessness of having left the gauze inside plaintiff's body caused her severe damage both physically as well as mentally. Plaintiffs alleged that, in to medical mishaps and the physical and emotional pain which such damages prompted, their intimate relationships became affected because of said colostomy[10], and that this affected

---

(Cont'd)

The State counter-sued Centro Ginecobstétrico physicians and alleged that they were in charge of managing the Obstetrics and Gynecology Department at the Mayaguez Medical Center, and of supervising medical personnel, thus, they would be vicariously liable. It further requested that said physicians reimburse any sums that it be forced to pay Plaintiffs.

Cause of action filed against Dr. Salvador Rovira Martino was dismissed by Partial Sentence on December 7th of 1989, grounded on that his intervention with the aggrieved party was limited to her pre-natal stage, that is, before any damages took place.

8. Through Partial Sentence dated July 20th of 1989, the Trial Court dismissed claims against Dr. Laura Rios, since she was covered by the immunity that is extended to State employees through Article 41.050 of the Insurance Code, 26 L.P.R.A. Sect. 4105.

9. Moreover, the Justice and Health Departments, as well as the Puerto Rico Medical Center, were included as defendants.

10. According to testimony by Plaintiffs, the attachment was so discomforting and unpleasant, that it hindered her from sustaining intimate relations.

their respective duties within the household. They claimed the sum of two million ($2,000,000.00) dollars in compensation for torts, and ten thousand ($10,000.00) in attorney fees plus costs.

After a full hearing was held on June 18th of 1990, the Court ruled sentence in favor of Plaintiffs, condemning E.L.A. and doctors Cruz-Santiago and Carlo Font for co-joint payment of one hundred and forty thousand ($140,000.00) Dollars for damages caused upon Mrs. Toro Aponte, plus ten thousand dollars ($10,000.00) for damages suffered by Mr. Alvarez Velez.[11] In its sentence, the sentencing forum imposed an equal level of liability upon defendants, for sole purposes relating to the internal amongst causing said damage. Subsequently it accepted a motion for reconsideration and through a ruling modified levels of liability for the physicians, increasing same to seventy five percent (75%).

Drs. Cruz Santiago and Carlo Font appeal said sentence and the ruling which modified same. Let us examine all three (3) indications of error under which they ground themselves to request that we revoke the Court´s rulings. Since we deem it to be appropriate, we shall first discuss the last indication of error.

---

11. In Puerto Rico the principle of co-joining of liability between co-causation of damages towards an aggrieved party, controls. *Sanchez Rodriguez v. Lopez Jimenez*, 118 D.P.R. 701 (1987). Furthermore, see *Ramos v. Caparra Dairy, Inc.*, 116 D.P.R. 60 (1985).

Appendix F

II

Appellants allege that the Trial Court erred by assigning them the greater level of liability for such negligence. They sustain that E.L.A. (Commonwealth) must bear the totality or the greater part of liability, since it was the employer of Nurse Arroyo, the direct precipitator of such damages.

(1) Within our jurisdiction, civil liability which derives from culpable or negligent acts or omissions, is governed by provisions of Article 1802 of our Civil Code, 31 L.P.R.A. Sect. 5141.[12] *J.A.D.M. v. Centro Comercial Plaza Carolina*, 132 D.P.R. 785 (1993); *Elba A.B.M. v. U.P.R.*, 125 D.P.R. 294 (1990); *Valle v. AMER. Int. Ins. Co.*, 108 D.P.R. 692 (1979); *Gierbolini v. Employers Fire Ins. Co.*, 104 D.P.R. 853 (1976). For civil liability to exist under the quoted article, it becomes necessary that the following events occur: a damage, a negligent act or omission, and a pertinent causal relationship between said damage and the negligent or culpable conduct. *Ramirez v. E.L.A.*, 140 D.P.R. 385 (1996); *Tormos Arroyo v. D.I. P.*, 140 D.P.R. 265 (1996); *Monllor v. Soc. de Gananciales*, 138 D.P.R. 600 (1995).

(2)(3) The concept of "guilt" of Article 1802, is as comprehensive and ample, as human conduct itself is.

---

12. Said article provides:

> "Whomever through action or omission causes damages to another, through intervening negligence or culpability, become obligated to repair such damaged caused therein. Concurring imprudence of the aggrieved party does not exempt liability but, entails a reduction of indemnity." 31 L.P.R.A. Sect. 5141.

Appendix F

Reyes v. Sucn. Sanchez Soto, 98 D.P.R. 305, 310 (1970). Negligence or culpability is the lack of due care which, in turn, consists in not anticipating or foreseeing the rational consequences of any act or omission of any action that any prudent person would have foreseen under identical circumstances. *Ramos v. Carlo*, 85 D.P.R. 353, 358 (1962). The need for orderly social co-existence imposes a general duty of correction and prudence, as it relates to others citizens, and such action is unlawful in an extra-contractual sense whenever same breaches general duties as to proper conduct or correction, duties which are not drafted within codes but which represent the minimal understood assumption about social order. *Ramos v. Carlo, supra.*

(4) "Guilt consists in omission of due diligence, use of which could have avoided any damaging results." C. Rogel Vide, Extra-Contractual Civil Liability, Ed. Civitas, 1976, page 90. Due diligence is that which is expected from the average human being, a good *Pater Familias.* If a damage is foreseeable by him, liability exists. If same were not foreseeable, we would, in general, have a fortuitous case. Jimenez v. *Pelegrina Espinet*, 122 D.P.R. 700, 704 (1982). In the past, and quoting Manresa, we have affirmed that negligence and culpability are two sides of the same coin, since "culpability requires execution of a positive action which causes damage to another person distinct than he who executes same, and negligence, in turn, assumes an omission which produces such identical effect, although both bear in common that such action is executed or such omission incurred into, without any noxious intent . . . 12 Manresa, *Comments to the Spanish Civil Code* (Comentarios al Código Civil Español) 6th Edition, 1973 page 837". *Gierbolini v. Employers Fire Ins. Co., supra*, page 857.

Appendix F

(5) The following elements are taken into consideration, to decide whether an omission has prompted liability: (1) existence or non-existence of juridical duty to act, by the alleged one causing such damage, non-compliance of which prompts such anti-juridical action and (2) if the omitted action had been undertaken, such damage would have been avoided. *Tormos Arroyo v. D.I.P., supra, Arroyo Lopez v. E.L.A.*, 126 D.P.R. 682 (1990); *Soc. Gananciales v. G. Padin Co. Inc.*, 117 D.P.R. 94 (1986).

(6) Last, we reaffirm that within our system governs the theory of adequate causality. According to this "not every condition without which a (damage) could have been produced is a cause, rather, what ordinarily produces same, according to general experience". J. Santos Briz, Derecho de Daños (Torts Law), Madrid, Ed. Rev. Der. Privado, 1963, page 215. See: *Soto Cabral v. E.L.A.*, 138 D.P.R. 298 (1995); *Miranda v. E.L.A.*, 137 D.P.R. 700 (1994); *Jiménez v. Peregrina Espinet, supra*; *Sociedad de Gananciales v. Jeronimo Corp.*, 103 D.P.R. 127, 134 (1974). Therefore, then "(a) damage seems to be the natural and probable result of a negligent act if, after the event, and observing such alleged negligent act retroactively, such damage appears as the reasonable and ordinary result of such act". *Torres Trumbull v. Pesquera*, 97 D.P.R. 338, 343-344 (1969). Having propounded such doctrinal background, we shall analyze the controversy brought before us.

Existence of damages suffered by plaintiffs-appellees is not under controversy in the instant matter. Neither is negligence by Nurse Arroyo as to counting of gauzes, her work relationship with the State, and liability by the latter

for its employees actions, under governance of Art. 1803 of the Civil Code, 31 L.P.R.A. Sect. 5142. It is proper that we evaluate whether physician was negligent Upon leaving a gauze within the body of Plaintiff. We affirmatively conclude so.

(7) We need to emphasize that we are in presence of a very serious omission while a surgical procedure was being performed. Though initial responsibility relative to counting of instrumentation and materials used does befall upon the nurse or assistant, it is the physician in charge who must verify by all means possible, that indeed no objects are present within the surgical area. Counting of objects or gauzes by assistants, is an alternate safety and verification method, to avoid that the surgeon omit his non-assignable duty of removing an object which must not remain inside a patient's body. The physician in charge of the surgery has absolute control over the instruments and materials which he introduces into the human body. Therefore, the primary responsibility of removing all instrumentation introduced into the body befalls upon such physician, and to insure once such surgery is completed, that same have been removed from the patient's body.[13]

---

13. Within American jurisdiction and under similar situations, an identical conclusion has been reached. Examine, as a comparison: D.W. Louisell, Medical Malpractice, M. Bender, 1995, sects. 3.08, 8.08(7), 14.02; 61 Am.Jur. 2d , "Physicians and Surgeons, etc.", sect. 258, page 397-399 (1981). Also see: *Sebastien v. McKay*, 649 So. 2d 711, 714 (La.App. 3 Cir. 1994); *Ravi v. Williams*, 536 So. 2d 1374 (Ala. 1988); *Grant v. Touro Infirmary*, 223 So. 2d 148, 154-155 (La. 1969).

Appendix F

We concur with statements by the Alabama Supreme Court that upon passing judgment over a case virtually identical to the instant one, concluded:

> "the responsibility of removing such gauzes befell upon the physician and not upon those nurses assisting him. He exercised exclusive control over such gauzes from the point when he placed same into plaintiff's body, until when he removed same. The mere fact that defendant delegated the task of counting said gauzes once these had been removed from the patient, in no way disengages defendant from his first-hand responsibility to have removed same. He bears the duty and responsibility of removing all gauzes. The nurses' responsibility of counting these after removal, is nothing more than an additional precaution taken by defendant as to assist him in making sure that he has appropriately complied with his duty. (Our translation and original emphasis.) *Powell v. Mullins*, 479 So. 2d 1119, 1126 (Ala. 1985).

(8) The physician must not lose from sight that his direct responsibility towards every patient goes above any over the nurse or the rest of any auxiliary personnel. His responsibility is not adequately discharged with simply delegating upon an assistant the counting of instrumentation, without verifying with full certainty, that no foreign objects have remained within the human body. Such practice is not consequential with diligent exercising of the medical profession which, due to nature of same, requires the greatest degree of care and caution. There exists no justification whatsoever to deviate

from the most basic rules that need to be followed to guarantee the health, safety and recovery of a surgery patient. In the bare end, we are not in presence of just another object, this deals with a human body and, above all, of a life which is can not be substituted for.

The only evidence as to Dr. Carlo Font's diligence in the performance of his Duties consisted of his affirmation during the hearing in full that "after the surgery he inspected the cavity where he had intervened with (and) . . . did not notice anything abnormal". ENP, page 13.

The Court concluded that the negligent conduct by defendant physicians was not limited to the omission of removing such gauze during surgery. In its sentence it emphasized the fact that Dr. Cruz Santiago had not ordered that Mrs. Cruz Aponte have tests done, from the very first time she complained about abdominal pains during her first visit to their offices, after the surgery, and that Dr. Carlo Font had neither detected nor suspected that something was wrong when he subsequently examined said patient and detected swelling and presence of a mass in her abdominal area. It compared the way in which doctors Cruz Santiago and Carlo Font responded to the attentions which Mrs. Toro Aponte required, with the attention provided by the others physicians which plaintiff consulted with, such as the promptness with which Dr, Casanova detected the cause for the malaise which patient was complaining about, and concluded that the initial physicians did not attain the standard of diligence that such situation demanded.

Appendix F

In conclusion, the subsequent treatment provided to Mrs. Toro Aponte by doctors Carlo Font and Cruz Santiago, significantly contributed towards delaying and to aggravate the damage. They did not use all means available to carry out a quick and trustworthy diagnosis as to the cause of such infirmity. In view of the aggrieved party's claims, treatment was just limited to prescribing analgesics. Under these circumstances, one most forcibly conclude that more effective measures had been taken, as other physicians subsequently did, the damage would not have been of such a magnitude. Finally, the element of causal relation is ever-present between the negligent omission and the resulting damages therein. The physician's omission, evidently a negligent one, was no doubt whatsoever, the cause of such damage.

(9) As an epilogue, we recall the statements of Joaquin Ataz Lopez, a reputable commentator of medical civil liability: "a lack of expertise shall always be a non-compliance. Whenever any professional commits himself to perform a certain act within his specialty, a presumption of expertise is attributable to him; and if it results that he lacks expertise, he has defrauded that trust granted to him, and has not correctly performed the action entrusted to him, wherefore, his civil liability would be based upon such non-compliance." (Emphasis in the original.) J. Ataz Lopez, Los Médicos y la Responsabilidad Civil (Physicians and Civil Liability), Madrid, Ed. Montecorvo, 1985, p. 282.

The negligent behavior displayed by doctors Carlo-Font and Cruz-Santiago, during and alter the surgery, justifies imposing a greater degree of liability for damages. The Court acted appropriately upon modifying the degrees of

negligence, and impose seventy five percent (75%) to the physicians, and twenty five percent (25%) upon the Commonwealth (E..A.).

III

On the other hand doctors Carlo-Font and Cruz-Santiago sustain that damages suffered by plaintiffs-appellees "were immediate, temporary, and did not leave any disability whatsoever". Allegation by appellants, page 9. As sole grounds to support their conclusion that such compensation needs to be reduced, they quote jurisprudence by this court in which they, allegedly, the magnitude of the damages was greater and the compensation granted was lesser. They sustain that upon comparing the dimension of damages and compensation granted in the captioned case with that of other "similar" cases, it becomes evident that trial court over-estimated plaintiff's damages. They are incorrect.

[10] From the start we reaffirm "that in relation to [the] difficult and anguishing task of comparing assessment of damages, trial courts ordinarily are better positioned than appeals courts to evaluate the situation, whereby they are the one which have a direct contact with the evidence which, to such effects, the claiming party presents therein". *Rodriguez Cancel v. A.E.E.*, 116 D.P.R. 443, 451 (1985). See: Quinones Lopez v. *Manzano Pozas*, 141 D.P.R. 139 (1996); *Torres Solis et al v. A.E.E. et als*, 136 D.P.R. 302 (1994). Hence, the party which requests a modification of the sums granted at the trial level, bears the obligation of demonstrating the existence of those circumstances which deem it meritorious that same be modified. Rodriguez-Cancel

v. A.E.E., supra. For said reason, we will only intervene in the amount awarded if it is exaggeratedly high or ridiculously low. *Sanabria v. E.L.A.*, 132 D.P.R. 769 (1993); *Riley v. Rodriguez de Pacheco*, 119 D.P.R. 199 D.P.R. 762, 805 (1987); *Urrutia v. A.A.A.*, 103 D.P.R. 643, 647-648 (1975).

Recall that "there are no two cases exactly the same; each case can be distinguished by its own and varied circumstances. That is why that... the decision rendered in a specific case in relation to this subject, cannot be considered a mandatory precedent for another case". Rodriguez Cancel v. A.E.E., supra. See *Vda. de Silva v. Auxilio Mutuo*, 100 D.P.R. 30, 34 (1971); *Baralt v. Baez*, 78 D.P.R. 123, 127 (1955). Assessment responds to single and particular factors which are not subject to indiscriminate extrapolation between one case and another. The compensation granted plaintiffs-appellees needs to be considered, in accordance with the particular facts of this case.

The situation before us displays extensive and severe damages. At the time of these events, the aggrieved party was twenty eight (28) years old, and enjoyed perfect health. She suffered severe organic damages, as an immediate result of the negligence by the nurse and physician who attended her during surgery; she had to go through two (2) additional operations, after which she was forced to remain admitted at the hospital in a convalescent state. As if this were not enough, she was forced to use an artificial attachment adhered to the perforation in her abdomen for ten (10) months to be able to evacuate, which severely affected her intimate relations and hindered performance of her household and

recreational tasks. Finally, she was afflicted by an intense and constant pain for more than two (2) months. At present she continues to suffer pain to her digestive system, and whenever having sexual relations. Her abdomen was marked permanently by a second scar, which intersects perpendicularly to the cesarean one. ENP, page 5.

Plaintiffs also presented evidence relating to damages suffered by Mr. Alvarez Velez, as a result of the damages suffered by Mrs. Toro Aponte. According to what he testified at trial, his partner's physical condition and mood caused him much suffering and affected their mutual relations, to the extreme that he considered the possibility of separating. To attend to them both, mother and daughter, he became dependent upon the assistance of other persons for performance of household chores. ENP, pages 6-8.

This factual background confirms the magnitude of the damages caused sufficiently as to not intervening with the compensation granted. The arguments leveled by doctors Cruz Santiago and Carlo Font do not convince us that the compensation granted by the trial court was exaggerated. Evidence by plaintiffs satisfied, to the trials court's satisfaction, the serious of the damages, evidence which was not rebutted by defendants. The comparative examination of jurisprudence indicated by defendants- appellants does not persuade us to modify the trial court's ruling.

Appendix F

IV

Lastly, defendants-appellants indicate that the sentencing forum erred upon concluding that they had admitted their civil liability for such negligence. They indicate that, although they had admitted the occurrence of a negligent omission, they had not accepted liability.

Such indication lacks grounds. Attorney for defendants, Jaime V. Biaggi, Esq., admitted in two (2) occasions before the trial court "that his retainers had accepted liability . . ." Minutes dated October 10th of 1989. Copy of the minutes were sent to attorney Biaggi on October 16th of 1989, and the record does not evidence that same had been objected. Defendants also stated to the Court, on several occasions, that they did not know upon what party and up to what degree, negligence should be imposed, subtracting credibility from their argument, that they had denied liability. In any case, admitting the occurrence of a negligent omission reduced such controversy, to determine upon whom befell the primary liability therein. The Court, on basis of the evidence and not solely upon the defendant-appellant's admission of liability, ruled that they were the ones proper to take appropriate measures towards avoiding occurrence of any damages and that said omission was the cause of such damages.

Due to the afore stated grounds, the trial court's sentence if affirmed inasmuch as joint liability by the Commonwealth (E.L.A.) and doctors Carlo Font and Cruz Santiago, as well as the Ruling which modified respective degrees of negligence. Appropriate sentence shall be rendered therein.

Associate Judge Mister Rebollo-Lopez issued the dissenting opinion. Associate Judge Mrs. Naveira de Rodon inhibited herself.

Appendix F

Dissenting opinion issued by Associate Judge Mr. Rebollo Lopez

We are not able to conform with the decision which the Court has rendered in the instant case. We specifically and vehemently dissent with the erroneous actions by the Court upon establishing a norm which imposes civil liability, in an absolute and automatic fashion, to surgeons in this country, as it relates to each and every one of all acts of negligence in which employees of a surgical room may incur into, while performing a surgical procedure; persons who are not employees of said physicians, who were neither selected or trained by them and who were so, by the hospital firm in which such procedure was carried out.

The majority of the members of this Court imposed or establish such absolute civil liability to surgeons within our country by applying for the first time, without expressly stating so, the "captain of the ship doctrine"[1], doctrine developed within "Common Law" jurisdictions and which, currently, are not only are discredited and in disuse but, moreover, is a minority one.

The erroneous decision rendered (herein) shall, unfortunately, have the inauspicious result of hinder such

1. This Court, in *Vda. de López v. E.L.A.*, 104 D.P.R. 178 (1975), left *quare* the ruling as to whether or not the "captain of the ship doctrine" should be adopted in Puerto Rico. Specifically, it was then stated that "(it) was unnecessary to decide . . . Whether to adopt the captain of the ship doctrine in Puerto Rico or not, since we deem that plaintiff's proof was insufficient to rebut the presumption of reasonable care towards the patient". (Note omitted). *Id*, page 182.

medical specialists from delegating to surgical room employees at the hospital, duties which have been traditionally delegated upon said assistants, for means of a more efficient and effective surgical practice. That is, the currently established rule of absolute liability shall force the surgeon to personally perform most of the duties which, ordinarily, are performed by said employees; This, for the purpose of being able to verify that such duties have been correctly executed. The Majority forgets that best practice of medicine makes it imperative that surgeons carry out their surgical duties free from "distractions" which entail Not being able to delegate said activities upon support personnel.

Henceforth, we can visualize the chaos which will prevail in surgery rooms throughout the country, in view of the justifiable "paranoia" from surgeons in verifying, to the point of doing so themselves, that information that has traditionally been provided by surgery room support personnel, are correct. We can imagine, then, such surgeon unnecessarily counting instruments and materials prior to initiating surgery, performing the surgery and, at the same time, making sure to take all of the patient's vital signs and if said patient is reacting adequately to the anesthesia administered to him.

I

From the start, we must recall "that law of torts in Puerto Rico is controlled, ith certain given exceptions established under our legislation, by rules of civil procedure. Rules from Common Law and from other juridical systems may provide useful material for a comparative study and, on occasions, the development of autochthonous institutions". *Gierbolini v. Employers Fire Ins. Co.*, 104 D.P.R. 853, 855 (1976).

Appendix F

On this day, the Majority of this Court sidelines said rule, using as grounds for their ruling, doctrines alien to our civil law system. We believe that the instant controversy should have been resolved in accordance with the mandates of the civil system. *See: Gierbolini v. Amer. Int. Ins. Co., supra, Valle v. Amer. Inter. Ins. Co.*, 108 D.P.R. 692 (1979). In spite of this, we have inquired within Anglo-Saxon law sources, such as the Majority did, with the intent of demonstrating that, even under such legal system invoked by them, their decision is erred.

Traditionally, in the United States and as it relates to this aspect within this field of torts, a doctrine of "principal and agent" has been established in terms of adjudicating liability in view of any specific negligent act. American courts have, specifically, utilized the doctrine of Respondeat Superior, to impose a liability upon the superior or employer, for the negligent actions of their agents or employees. Under said Doctrine, it is presumed that the principal (employer) has the means and power to control the actions of their employees (agents). That is, under said doctrine, the employer responds in whatever measure under Which it has control over the negligent actions of their employees or agents.

Respondeat Superior is, thus, a modality of the "Vicarious Liability" Doctrine, In which the principal responds in whatever measure such stated action is executed by the agent, within the scope and course of his duties therein. Legal Medicine: Legal Dynamics of Medical Encounters, American College of Legal Medicine, Saint Louis, The C.V. Mosby Co., 1988, page 73.

Appendix F

In light of such Doctrine, several doctrines surfaced within Anglo-American Law, applicable to medical cases, one of which is the "captain of the ship doctrine". Said doctrine surfaced in the United States as a result of that prior to 1940, persons who suffered damages as a result from surgical procedures, had limited possibilities of receiving compensation through judicial means. That being so since under the prevailing judicial system of the time, hospital Firms were immune from such types of claims, since they effected charitable Causes which benefited the community as a whole (charitable immunity). Furthermore, the economic frailty and the fear that one single sentence would eliminate a given hospital's future, became a real threat, in view of the important social function executed by such hospitals. J.R. Yungtum, The "Captain of the Ship" Sets Sail in Nebraska: Long. V. Hacker, 29 (No. 1) Creighton L. Rev. 379, 390'391)1995.

With the intent of offering plaintiffs an actual possibility of being compensated, the Pennsylvania Supreme Court established the so-called Captain of the Ship Doctrine" in the case of *McConnell v. Williams*, 65 A. 2d 243 (Pa. 1949). In said case, stated judicial forum pointed out that, under said doctrine, it is the surgeon who shall be responsible for the negligence of any person present within the surgery room, such as a captain of a ship is responsible for all of the actions by his crew.

Subsequently, immunity of hospitals became a thing of the past; this particularly since hospitals began to protect their interests by obtaining insurance for their employees. Yungtum, *supra*, page 392, quoting SA.H. Price, The Sinking

of the "Captain of the Ship". Reexamining the Vicarious Liability of an Operating Surgeon for the Negligence of Assisting Hospital Personnel, 10 J. Legal Med. 323, 332 (1989). Already by the decade of the mid forties, most American jurisdictions stopped applying the ¨Captain of the Ship¨ Doctrine, same being considered out of style and it applicability as unnecessary, since such doctrine no longer complied with the purpose for which same had been developed. Yungtum, supra, page 394. It seems curious to point out that the jurisdiction which originally established the ¨Captain of the Ship¨ Doctrine, that being Pennsylvania, has abandoned same and uses the Borrowed Servant Doctrine. *Thomas v. Hutchinson*, 275 A. 2d 23 (Pa. 1971).[2]

Moreover, the State of Maryland abolished the "Captain of the Ship" Doctrine in view of the change of scope about hospitals as charitable institutions. In *Franklin v. Gupta*, 567 A.2d 524 (Md. Ct. Spec. App. 1990), said Federal Forum pointed out that there no longer exist economic reasons which justify imposing vicarious liability upon surgeons, in response to victims of medical lack of expertise. *Id*, page 538. Stated court indicated that although a physician may be liable, whenever he borrows an employee from another, the decision in *McConnell v. Williams*, 65 A 2d 243 (Pa. 1949), same must not be seen as imposing liability *per se* upon all surgeons, rather that liability may be imposed on basis of the master and servant doctrine.

---

2. The Texas Supreme Court, in turn, has specifically pointed out that it totally disapproves the "Captain of the Ship" Doctrine. *Sparger v. Worley Hospital, Inc.*, 547 S.W. 2d 582 (Tx. 1977).

Appendix F

Under the Master and Servant Doctrine (agent theory), a physician is liable for The negligence of his employees or "servants", most of such cases dealing with nurses, assistants or technicians to whom such physician himself pays salaries To, and respond solely to his instructions. That is, a physician does not respond vicariously unless his own employee or "servant" has been the cause of damages in question, during the course of his employment. J. Talbot Young, Jr., Separation of Responsibility in the Operating Room; The Borrowed Servant, the Captain of the Ship, and the Scope of Surgeons' Vicarious Liability, 49 (No. 4) Notre Dame Law 933, 934 (1974).

Whenever an employee has a single employer, it becomes easy to determine who has "vicarious responsibility" for the actions of the former. Nevertheless, such situation become more complicated when, as in the instant case, the nurse is an regular hospital employee, but the physician "borrows" her services for a specific surgical procedure. As a result of such situation, the United States developed another off-shoot of the "Respondeat Superior" Doctrine known as the "Borrowed Servant". Contrary to the "Captain of the Ship" Doctrine, according to which the surgeon is responsible for all negligent acts which take place in the surgery room by any of the persons present therein, under the Borrowed Servant Doctrine, this is not necessarily so.

The Borrowed Servant Doctrine consists in that the employer or principal "loans-out" his agent or employee to a third party. Whether such "loan" is free or remunerated does not control. Legal Medicine: Legal Dynamics of Legal Encounters, op. cit, page 73. If the second employer, that

being the physician in the instant case, assumes absolute control over said employee, then this second employer is who must be liable for negligent acts committed by the employee; that is, what is critical is to decide who exercised control over said employee at the time of the negligent action. Nevertheless, if it is determined that both employers exercised equal control over the employee, then both employers are liable. *Id.*

The above stated constitutes one of the reasons why we cannot agree with the position taken by the Majority of this Court, by imposing such liability upon doctor Carlo Font, for the negligent actions by the nurse, a hospital employee, simply because she was under temporary supervision from stated physician. It is an undeniable fact that the doctor did count upon the services of said nurse during the surgical procedure. Nevertheless, during said period of time said nurse did not cease to be a hospital employee. It was the hospital which paid for her services, which decided her work schedule, that evaluated her services and which had a right to retain or dismiss her. Moreover, it was the hospital the one responsible for verifying her credentials at the time they contracted her services, and which had the duty of training her in an optimal manner, according to the duties and obligations proper of her post. We must not lose sight that the surgeon does not choose the personnel assisting him during surgical procedures which he performs at a given hospital.

By the mere fact that the nurse rendered her temporary services to said doctor, he had not ceased to be directly responsible to the hospital. See: *Foster v. Englewood Hospital Association*, 313 N.E.2d 255 (1974); *Olander v.*

Johnson, 58 Ill. App. 89 (1930). We believe that the statements formulated in the stated Olander case, supra, are very wise, to the effect that:

> *Generally, an operating surgeon is not legally responsible for the mistake of a nurse, not his employee, where an operation performed at a hospital not owned or controlled by the surgeon.*[3]

Furthermore, he requested a materials count from the nurses, who informed him that such count was correct. Parties in said case accepted that the surgeon has a duty to engage all his attention to said surgery, and that the patient's life would be affected if the surgeon were to also take time towards counting used and removed gauzes. The court ruled that it was indisputable that surgery in this case had been carried out according to the rules and customs established by the hospital, and that the doctor made sure that institutional rules regarding counting of gauzes were carefully and correctly followed. Stated court further determined that the fact that one of the nurses committed an error, was not the surgeon's fault, and that same had been committed, regardless of all precautions that had been taken. It was emphasized that the surgeon requested the count, examined the area, and everything looked fine; moreover, he followed all of the methods approved for examining a patient after surgery. Stated court concludes by indicating:

---

3. In the case of *Olander v. Johnson*, 258 Ill. App. 89 (1930), the plaintiff had his appendix removed and, inadvertently, the doctor left a gauze within is abdominal cavity. The doctor had carried out a visual inspection of the patient's surgical area, not finding any gauze of foreign material whatsoever.

Appendix F

"*In short, just as a rule making a surgeon liable for every negligent act of every hospital employee under his control is too harsh, a rule exculpating him for every negligent act of persons under his control simply because they are not his employees, is lenient.*" *Olander v. Johnson, supra*, page 261.

In the case of *Foster v. Englewood Hospital Association*, 313 N. Ed.2d 255, 260 (1974), it was noted that "*a nurse is still subject to the rules and regulations of the hospital, and the doctor may not gainsay them. She may be discharged by the hospital but not by the doctor. The hospital, not the doctor, furnishes the equipment that the nurse uses, and she is paid by the hospital. We conclude, therefore, that the employees of the hospital assisting a surgeon remain the employees of the hospital, even though the surgeon retains some degree of control over them*". (Quotes omitted and emphasis provided.)

However, there is more. It is proper to emphasize the fact that in North American jurisdiction a distinction has been made between acts or duties performed by the nurses called "administrative", and others which involve certain medical skill or judgment. Thus, it has been understood that surgeons are liable for the negligence in which a nurse may incur in the performance of her "medical" duties, while the surgeon is not liable for negligence occurring during the performance of her "administrative" duties, since with respect to these types of duties, she is acting as a hospital employee. See: 61 Am. Juris 2d Sec. 288, page 438 (1981); *Rural Educational Association v. Bush*, 298 S.W.2d 11 (Fla. 1967). *Buzan v. Mercy Hospital, Inc.*, 203 So. 2d 11 (Fla 1967). Specifically, hospitals respond for negligence by their nurses upon performing "administrative duties", which, even when same

are essential for the patient's well-being and success of the surgery, do not require use of specialized knowledge or techniques. *Swigerd v. City of Ortonville*, 75 N.W. 2d 217 (Minn. 1956).

The case of *Buzan v. Mercy Hospital, Inc., supra*, is an illustrative one. In same, a surgeon and the hospital were sued, since during the surgery, a foreign object was left inside his abdomen. The court went on to consider whether the nurse who had assisted the surgeon during the operation, and who had counted the materials, was a employee (servant) of the hospital, or was a borrowed servant of the surgeon. They recognized the need to carry out a distinction between the type of act or service attributed to the hospital nurse, upon assisting with the surgery. Stated court indicated the following:

Basically, duties of such an assisting nurse which involve professional skill or decision are regarded as controlled solely by the surgeon or doctor. On the other hand, in performing services or acts not involving professional skill or decision, and which are ministerial in character, a hospital nurse assisting a surgeon is not regarded as a borrowed servant. A sponge count by an assisting nurse generally is held to be in the latter category. (Emphasis provided)[4] *Buzan v. Mercy Hospital, Inc., supra*, page 13.

---

4. One must keep present that the majority of American courts which have found physicians liable for the negligence of other persons who are present in the surgery room or which have used the "Captain of the Ship Doctrine" have done nothing else than apply

(Cont'd)

Appendix F

The same as with the instant case, the majority of these malpracticē cases are related to having left gauzes or other foreign objects within the bodies of patients, upon performing a surgical procedure. Physicians have been imposed a responsibility since their negligence may be inferred by the mere fact that the patient has a foreign body, after the surgery. Notwithstanding, if the theory of ***Res Ispa Loquitor*** is applied, negligence is direct, not vicarious, and physician may prove the contrary. See: *Martin v. Perth Amboy General Hospital*, 104 NJ Super. 335, 250 A 2d 40 (NJ Super 1969); *Sanzari v. Rosenfeld*, 34 NJ Super, 128, 140 (1961); *Davis v. Kerr*, 239 Pa. 351, 86 A. 1007 (1913).

As to this last aspect, we join what has been ruled by several American courts to the effect that the surgeon physician shall not be liable for leaving foreign objects within the body of patients, if he exercised a reasonable degree of care to avoid this from happening, and that he cannot become liable for the fact that, in effect, a gauze was left inside the body of a patient. *Miller v. Tongen*, 281 Minn. 427, 161 N.W. 2d 686 (1968); *Rayburn v. Day*, 126 Or. 135, 268 P. 1002 (1928).

It is in light of the above statements that we dissent from the majority opinion of this Court. Negligence in the instant case bore exclusively upon the nurse, for not having kept

---

(Cont'd)

the *Res Ispa Loquitor* Doctrine. *Rudeck v. Wright*, 218 Mont. 41, 709 P.2d 621 (Mont. (1985); *Burke v. Washington Hospital Center*, 475 F. 2d 364 (Circ. D.C. 1973); *Ales v. Ryan*, 8 Cal. Rptr. 2d 82 (1936); *Shannon v. Jaller*, 6 Ohio App. 2d 206, 217 N.E. 2d 234 (1966); *Ybarra v. Spanguard*, 25 Cal. Rptr.2d 486 (Cal. 1944).

adequate count of instruments and materials used during the surgical procedure, duty that is purely administrative or ministerial, wherefore her employer, the hospital, must be liable.

II

Applying everything indicated above to the instant case, our opinion is that there exists no other conclusion other than liability by the hospital for the negligent actions in which its employee nurse Norma Arroyo, incurred and not, as erroneously ruled by the Majority, doctor Carlo-Font.

As in fact it arises from the majority opinion issued by the court itself, during the surgical procedure effected upon co-plaintiff Toro, present was a nurse, employee of the Commonwealth of Puerto Rico, who was specifically in charge of, among other duties, counting the surgical instruments and gauzes which were used by said surgeon, during same. Upon "finishing" said surgery but before proceeding to suture said patient, Dr. Jorge Carlo Font - the surgeon - specifically requested that nurse - Mrs. Norma Arroyo - count the instruments and gauzes used during same; this, with the obvious purpose of avoiding precisely what occurred, that is, that some gauze or instrument be left within the abdominal cavity. Said nurse assured the surgeon that all instruments and gauzes used in the surgery were outside of the patient's body.[5] Not content with the stated affirmation

5. To these effects, said nurse signed a certification after the procedure was completed, which is a requirement that needs to be complied with in these cases.

by nurse Arroyo, doctor Carlo Font Examined the patient's body, not detecting any gauze or instrument, after which he proceeded to suture up the patient.

In other words, and stated in a simpler fashion, Doctor Carlo Font, during Said surgical procedure, exercised all the care which could be demanded Upon a surgeon, under this type of situation. That is, stated co-defendant, at that point, rendered to his patient the medical attention which, in light of modern means of communication and teachings, and in accordance with the state of scientific knowledge and prevailing practices within medicine, satisfies demands generally acknowledged by the medical profession itself. Rodriguez *Crespo v. Hernandez*, 121 D.P.R. 639 (1988). We should not, I repeat, lose sight that no surgeon, during the course of an operation be attentive to and keep count of how many gauzes are used during same, either by himself, as well as by any of his assistants.

If stated responsibility is demanded of him, there would be no reason whatsoever, just as an example, the he keep count of, personally and continuously, of how much anesthesia the patient is being given and what is his heart pulse rate per minute, as well as what is the patients blood pressure. This befalls upon the anesthesiologist who participates in such surgery the surgeon by necessity trusting upon the information which the other provides him with. We cannot understand how this Court can establish in this era of medical advancements in which we live, the rule that, in effect, we are in presence of an "omission of a serious nature" from such surgeon. We repeat, that pertains to support personnel existing at those surgery rooms.

Appendix F

This view by the Majority ignores modern techniques within this area of medicine. We can take judicial knowledge of the fact that as of today surgical procedures are performed, whereby a surgeon does the initial incision in the patient's body, and another is the one who performs such delicate surgery proper, and another one sutures. This is ordinarily done with the intention that the specialized surgeon can participate in numerous surgeries during the same day, he not being present when the surgery "begins" or whenever the same is "completed". Said situation, as is well known, is typical for open heart surgery. It is proper that we ask ourselves: if a gauze is left inside a patient's body during any one of these surgeries, which surgeon would be then liable? The one who did the initial incision, the one who does the specialized surgical procedure, or the one who sutures, or all of them, in spite of the fact that there exists a possibility that upon "completing" the surgery, some of them were not physically present at the surgical site?

Would it not, consequently, be more reasonable to establish a rule in effect, that it is the support personnel's responsibility to correctly count surgical instruments and materials which were used during the surgery, task which does not require any medical knowledge or skill whatsoever?

III

Regardless of everything stated above, we must acknowledge that defendants appellants were negligent during the post-surgical treatment that they rendered co-plaintiff Toro-Aponte, upon not noticing the possibility that a gauze may have been left within her abdomen and/or upon

not ordering appropriate and standard tests to be performed on her, in timely manner, for these sorts of cases; negligence which, with greatest probability, unnecessarily aggravated such person's condition and, consequently, the physical damages and mental anguish which said stated co-plaintiff suffered.

In other words, it is our opinion that in such stage of the occurrence, appellant physicians did not render their patient that medical attention which, in view of current means of communication and teachings, and in accordance with current scientific knowledge and prevailing practices within medicine, complies with generally acknowledged demands of the medical profession itself. *Rodriguez Crespo v. Hernandez, supra.*

Contrary to the majority of the members of the Court, nevertheless, our opinion is that the percentages for negligence which were ruled as proper by the trial court, must be inverted. That is, it is our opinion that co-defendant nurse and her employer, the Hospital, should become liable for seventy five (75) percent of damages decreed thereto, and appellant physicians for a twenty five (25) percent.

It is for all of the above that we dissent.

Appendix F

CERTIFICATION

CERTIFIED: To be a true and correct translation of its original document in the Spanish language, into English and to the best of my ability as a Federally Certified Translator & Interpreter for the U. S. District Court for the District of Puerto Rico and for the Administrative Office of the United States Courts.

Carlos T. Ravelo, USCCI*

*THIS IS AN E-MAIL CERTIFICATION WITH

THE SAME VALIDITY AND FORCE AS THE
ONE BEARING MY SIGNATURE.

No. 05-721

IN THE

Supreme Court of the United States

TURABO MEDICAL CENTER, INC. D/B/A HOSPITAL INTERAMERICANO DE MEDICINA AVANZADA,

Petitioner,

v.

MARÍA YOLANDA MARCANO RIVERA ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

REPLY BRIEF FOR PETITIONER

ORLANDO H. MARTÍNEZ-ECHEVERRÍA
FERNANDO E. AGRAIT
701 Ponce de León Avenue
San Juan, P.R. 00907
(787) 722-2378

THEODORE B. OLSON
Counsel of Record
THOMAS H. DUPREE, JR.
AMIR C. TAYRANI
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Counsel for Petitioner

RULE 29.6 STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

RULES

REPLY BRIEF FOR PETITIONER

Respondents' brief in opposition relies on rhetoric and mischaracterization in an unavailing effort to reconcile the decision below with *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938). But nothing in respondents' brief can conceal the fact that the First Circuit's decision to apply the federal excessive damages standard in a diversity case governed by Puerto Rico law directly conflicts with *Erie*, and worsens the circuit split over the proper application of *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996).

Respondents frame the question presented as "whether the First Circuit erred in concluding that, *under Puerto Rico case law*," the medical malpractice damages awarded to respondents were not excessive. Opp. i (emphasis added). But the First Circuit *did not apply* "Puerto Rico case law." Rather, the court concluded that because the Puerto Rico excessiveness standard is worded in "terms similar" to the federal "grossly excessive" test, *Gasperini* did not require application of the Puerto Rico standard. Pet. App. 17a. Thus, rather than compare the award to similar medical malpractice awards issued in Puerto Rico courts—the approach mandated by Puerto Rico Supreme Court precedent—the First Circuit simply compared the award to another First Circuit decision, and proceeded to uphold it. Pet. App. 18a.

By declining to compare the award to those approved in similar Puerto Rico cases, the First Circuit was able to uphold a significantly larger award than respondents could have obtained in Puerto Rico court. The decision below therefore contravenes *Erie*'s fundamental purpose of ensuring substantial uniformity of outcome between state-law claims tried in state and federal court, *see Guar. Trust Co. v. York*, 326 U.S. 99, 109 (1945), and exacerbates the circuit split over whether *Gasperini* commands federal courts sitting in diversity to apply state or federal excessiveness standards.

I. THE DECISION BELOW CONFLICTS WITH *ERIE*.

"*Erie* precludes a recovery in federal court significantly larger than the recovery that would have been tolerated in state court," and therefore mandates that federal courts sitting in diversity apply substantive state-law excessive damages standards. *Gasperini*, 518 U.S. at 431. When respondents' legal and factual mischaracterizations are stripped away, it becomes apparent that the First Circuit's refusal to apply Puerto Rico's medical malpractice excessiveness standard to review the $5.5 million verdict in this Puerto Rico law diversity action is inconsistent with *Erie*.[1]

Respondents contend that the First Circuit's decision can be reconciled with *Erie* because Puerto Rico's excessive damages standard is identical to the federal standard and thus is not "substantive" for *Erie* purposes. Opp. 13-15. But this is plainly incorrect, as the Puerto Rico standard commands courts to compare the award to verdicts in other Puerto Rico medical malpractice cases. *See Nieves-Cruz v. Universidad*

---

[1] Respondents describe HIMA's references to a $5.5 million verdict as "misleading[]," Opp. 1, because the jury found both HIMA and Dr. Pedro Roldán Millan (the obstetrician who induced and managed the delivery of Fabiola) at fault, and apportioned 47% of the damages to HIMA and 53% to Dr. Roldán. Pet. App. 6a. But an excessiveness inquiry focuses on whether the damages awarded are more than necessary to compensate the plaintiff for his or her injury. Thus, the relevant figure is the total amount of the jury award, not the amount imposed against a particular party after discounting for comparative fault. Respondents also suggest that it is "undisputed" that Fabiola was injured "because of petitioner's negligence." Opp. i. This is a blatant mischaracterization of the record. HIMA's negligence was not "undisputed." To the contrary, HIMA has always taken the position—at trial and now on appeal—that it was *not* negligent. *See* Pet. App. 8a.

de Puerto Rico, 151 P.R. Dec. 150 (2000) (Pet. App. 53a) (reducing a malpractice award because it exceeded the "parameters" of precedent).

The Puerto Rico Supreme Court adopted this approach in light of its concerns about the "difficult and distressing" nature of judicial attempts to "estimat[e] and apprais[e] damages" in medical malpractice cases. *Nieves-Cruz*, 151 P.R. Dec. 150 (Pet. App. 51a). Much as other jurisdictions have imposed statutory damage caps on medical malpractice awards, Puerto Rico has sought to ensure "reasonable limits" and promote consistency through this comparative review process. *Riley v. Rodríguez de Pacheco*, 119 P.R. Dec. 762 (1987) (Pet. App. 212a-13a). And just as *Erie* requires federal courts sitting in diversity to apply state-law statutory caps limiting malpractice awards, *see Gasperini*, 518 U.S. at 428-29, a federal court adjudicating a medical malpractice claim under Puerto Rico law must adhere to those decisions implementing Puerto Rico's comparative excessiveness standard because that standard embodies Puerto Rico's substantive policy of maintaining consistency among malpractice awards. *See id.* at 429 (concluding that New York's excessive damages standard, which required a comparison with awards in previous cases to determine whether the verdict "deviate[d] materially" from prior awards, was substantive for *Erie* purposes).[2]

---

[2] Respondents attempt to distinguish New York's "deviates materially" standard from the comparative inquiry used to implement that standard, arguing that only the "deviates materially" standard—not the comparative inquiry itself—was substantive for *Erie* purposes. Opp. 15. This reading of *Gasperini* is insupportable. The *Gasperini* Court explained that the New York excessive damages statute embodied an "objective [that] is manifestly substantive" and therefore held that federal courts sitting in diversity must undertake the same comparative inquiry as a New York state court. 518 U.S. at 429, 437. Indeed, it would have been impossible for a federal court to implement the "deviates materially" standard without performing the comparative analysis that undergirded it.

Contrary to respondents' mischaracterizations (Opp. at 1, 7, 9), HIMA does not suggest that Puerto Rico's standard mechanically requires the reduction by fifty percent of all medical malpractice awards. The Puerto Rico standard instead requires that such awards be compared to prior verdicts upheld in similar medical malpractice cases in Puerto Rico courts. There is thus a fundamental distinction between the Puerto Rico excessiveness standard and the federal standard applied by the First Circuit: the Puerto Rico standard requires a comparison with previous awards in *Puerto Rico* cases; the federal standard requires a comparison with prior *federal* decisions. *Compare Nieves-Cruz*, 151 P.R. Dec. 150 (Pet. App. 53a) (comparing a malpractice award with the verdict in *Riley*), *with* Pet. App. 18a (comparing the award against HIMA with the verdict in *Muniz v. Rovira*, 373 F.3d 1 (1st Cir. 2004)).

Indeed, subsequent to its *Riley* decision, the Puerto Rico Supreme Court has consistently reviewed medical malpractice awards for excessiveness by comparing the size of the award with those in previous Puerto Rico cases. *See Blás Toledo v. Hosp. Nuestra Señora de la Guadalupe*, 146 P.R. Dec. 267 (1998) (Pet. App. 152a) (reducing a medical malpractice award to a brain-damaged child and her mother from $2.2 million to $1.55 million after comparing the award with the verdict in *Riley*); *Nieves-Cruz*, 151 P.R. Dec. 150 (Pet. App. 53a) (relying upon *Riley* to reduce by half a $3.975 million medical malpractice award to a brain-damaged child); *see also Riley*, 119 P.R. Dec. 762 (Pet. App. 214a) (reducing by half an $800,000 medical malpractice award to a brain-damaged child). Notably, the only other medical malpractice excessive damages case cited by respondents utilized just such a comparative inquiry. *See Toro Aponte v. E.L.A.*, 142 P.R. Dec. 464 (1997) (Resp. App. 28a) (affirming a medical malpractice verdict because the "comparative examination of jurisprudence . . . does not persuade us to modify the trial court's ruling").

Notwithstanding respondents' protestations, the cases relied upon by HIMA were not "carefully selected" from among conflicting Puerto Rico precedents. Opp. 6. *Riley*, *Nieves-Cruz*, and *Blás-Toledo* provide an authoritative statement of Puerto Rico's medical malpractice excessiveness standard. They therefore were the only Puerto Rico excessive damages cases submitted in translated form to the First Circuit and are the only Puerto Rico excessive damages decisions that the court of appeals cited. Pet. App. 16a.

Riley, *Nieves-Cruz*, and *Blás Toledo* are also the most factually relevant precedents. Indeed, the facts of *Nieves-Cruz*, where a $3.975 million verdict was awarded to a child who suffered neonatal asphyxia during birth due to the improper administration of drugs to the mother (151 P.R. Dec. 150 (Pet. App. 35a)), are virtually indistinguishable from this case, where Fabiola was awarded $4.0 million to compensate for the injuries attributable to the neonatal asphyxia she experienced during birth. The Puerto Rico Supreme Court reduced the *Nieves-Cruz* award by half because it was "substantially higher than what [the court] ha[d] granted in cases similar to this case." Pet. App. 52a.

Similarly, in *Blás Toledo*, the Puerto Rico Supreme Court reduced by half a $500,000 medical malpractice award that compensated a brain-damaged child for her mental and physical suffering and an $800,000 award that compensated the mother for her emotional pain. 146 P.R. Dec. 267 (Pet. App. 152a). Respondents attempt to distinguish *Blás Toledo* on the ground that the child had died during the appeal. Opp. 9. But the Puerto Rico Supreme Court placed absolutely no weight upon the child's death when reducing the award; the court instead explained that it was seeking to bring the size of the award into conformity with the *Riley* benchmark. *See* Pet. App. 152a ("it is our opinion that the $800,000 compensation awarded for such items by the trial court is 'exaggeratedly high,' especially in light of the decision in *Riley v. Rodríguez de Pacheco*").

Accordingly, if respondents had pursued the suit that they initially filed in Puerto Rico court, the Puerto Rico Supreme Court would have effectuated Puerto Rico's substantive policy of promoting consistency among medical malpractice awards by relying upon *Riley*, *Nieves-Cruz*, and *Blás Toledo* to reduce the jury's $5.5 million award to an amount commensurate with the awards in previous cases.

None of the other Puerto Rico cases cited by respondents involves an excessive damages challenge to a medical malpractice award. Several of them are not even medical malpractice cases. *See Elba A.B.M. v. U.P.R.*, 125 P.R. Dec. 294 (1990) (reviewing an award for injuries resulting from a sexual assault); *Quiñones Lopez v. Manzano Pozas*, 141 P.R. Dec. 139 (1996) (reviewing an award for injuries resulting from a car accident). The lone medical malpractice case cited by respondents is a nonprecedential per curiam opinion that involved additur—not remittitur. *See Velazquez Ortiz v. U.P.R.*, 128 P.R. Dec. 234 (1991).

Contrary to respondents' suggestion, the First Circuit's violation of *Erie*'s animating principles did not constitute "harmless error." Opp. 17. If the First Circuit had adhered to *Erie*'s strictures by applying the Puerto Rico medical malpractice excessiveness standard, it would have compared the $5.5 million verdict with the significantly smaller awards in *Riley* ($400,000 for a brain-damaged child's mental and physical injuries), *Nieves-Cruz* ($1.987 million for a brain-damaged child's physical injuries, impaired income potential, and future expenses), and *Blás-Toledo* ($250,000 for a brain-damaged child's mental and physical suffering and $400,000 for the mother's emotional suffering). On the basis of these precedents, a Puerto Rico court would have reduced the verdict against HIMA because it is "exaggeratedly high" when compared with the amounts in those factually similar cases. The First Circuit, in contrast, did *not* compare the award in this case to the awards in *Riley*, *Nieves-Cruz*, or *Blás-Toledo*. Its failure to undertake this comparative inquiry enabled re-

spondents to recover a larger award than they would have obtained in Puerto Rico court and thus impeded *Erie*'s objective of securing "substantial uniformity of predictable outcome between cases tried in a federal court and cases tried in the courts of the State in which the federal court sits." *Sun Oil Co. v. Wortman*, 486 U.S. 717, 727 (1988).

This Court's review is warranted to ensure—as *Erie* envisioned—that the happenstance of diversity of citizenship does not result in a larger award being recovered in federal court than would have been obtained in state court.

II. THE DECISION BELOW WORSENS THE CONFLICT AND CONFUSION OVER *GASPERINI*.

Respondents' effort to harmonize the circuits' varying approaches to *Gasperini* only highlights the confusion in the lower courts, and further demonstrates the need for plenary review.

The circuits are split three ways over the application of *Gasperini*'s holding that federal courts sitting in diversity must apply substantive state-law excessiveness standards. One group of circuits—including the Eighth and Tenth—interprets *Gasperini* as requiring the application of state excessiveness standards in *all* diversity cases; another group—including the Sixth, Seventh, and Ninth—has issued post-*Gasperini* opinions that continue to apply the federal excessiveness standard in diversity cases, without even considering the possibility of applying state law; and a third group—including the First Circuit—applies state-law excessiveness standards in diversity cases unless the state standard is worded in "terms similar" to the federal standard. Pet. App. 17a.

Respondents assert that "[t]here is no conflict" among the circuits because "any-one of them" would have applied the federal excessiveness standard in this case. Opp. 19. But this is obviously incorrect. Because the Eighth and